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IN THE
Supreme Court of the United States

OCTOBER TERM, 1954

No. 21

RAY BROOKS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF AMICUS CURIAE
(Genesee Foundry Company, Inc.)

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The entire brief for the National Labor Relations Board is based upon the theme, repeated over and over, that the "one-year rule" is a valid "accommodation" between, on the one hand, freedom to refrain from collective bargaining and, on the other hand, "stability in industrial relations." Out of this thesis of "accommodation" between liberty and stability proceeds all the argumentation, clothed in varied phrase, set forth in the Board's brief.

This philosophy of "accommodation", siren to the ear, can assume a sinister aspect when imported into either political or jurisprudential thinking. To be sure, compromise and adaptation are often desirable solutions of problems which admit of such treatment. And even liberty may

on occasion be checked by government when its abuse would trample another man's rights. But never should it be forgotten that the love of freedom is the spirit that has made this country. The convenience of administrative bureaus, the ambition of bargaining agents, the fancied stability of status, weigh light indeed when freedom is in the balance.

The Board, pushing into the shadow the human liberty of employees, paints a subtle picture of stability, repose, and "subordination of employee sentiment." The Board's entire approach, exemplified throughout its brief, is one that is as old as history and one that has been the harbinger of many an ancient disaster.

There were once many Athenians who desired to "accommodate" with the Macedonians, especially after the defeat of Thebes. But Demosthenes, in his speech On the Crown, recalling the glories of Salamis, praised the Athenians of that earlier day who "looked not for an orator or a general who might help them to a pleasant servitude: they scorned to live, if it could not be with freedom."

Another immortal statesman, Edmund Burke, also had something to say on the subject of an "accommodation" with freedom. With eloquent irony, in his Speech on Conciliation with the Colonies, he told the Commons that:

"Perhaps a more smooth and accommodating spirit of freedom in them [the colonists] would be more acceptable to us. Perhaps ideas of liberty might be desired, more reconcilable with an arbitrary and boundless authority. Perhaps we might wish the colonists to be persuaded, that their liberty is more secure when held in trust for them by us (as their guardians during a perpetual minority) than with any part of it in their own hands."

The employer here is a small employer. There is not even a score of employees. But imbedded in this case is a great principle, the cause of economic liberty itself. What is at stake is the liberty of a group of men to take back an agent's power to make a contract affecting their very livelihood and the conditions of their daily work. Government cannot touch a man more closely than this. These are truly among the freedoms most jealously held, and among the chief advantages worth living for.

Congress has not said that this freedom should no longer exist in the United States. It is the Board which has invented this so-called rule of "accommodation"—a "poisonous gloss", as Coke once expressed it, "which corrodes the vitals of the text." (11 Coke, 34.) And, in point of actual fact, there is not even any language in the statute which the Board is here seeking to interpret. The Board's position is simply that it does not want employees to revoke a bargaining agency for a year after the Board has gone to the trouble of holding an election. But this is not the law. This is mere administrative desire and convenience. The Board has no cause to feel aggrieved if, for reasons cogent to the employees, they lose confidence in their bargaining agent and repudiate him before he signs a contract. The Act was not passed to benefit the Board. On the contrary, when Congress was amending the Act in 1947 and seeking to correct some of the abuses which had arisen "as a result of labor laws ill-conceived and disastrously executed",¹ this is what Congress had to say: "In other words, when Congress grants to employees the right to engage in specified

¹H. Rep. No. 245, 80th Cong., 1st Sess., p. 3.

activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so."²

The issue in this case is not, as envisaged by the Board (p. 10 of its brief), whether employees should be permitted to choose representatives at will after the signing of a contract; the issue is not whether a rival union or an employer may "challenge" a certification within a year; it is not whether an employer can escape bargaining for a year by claiming a doubt as to the union's majority; it is not whether a new election may be had within a year. *The issue is whether the holding of a Board-conducted election prevents a majority, before execution of a contract, from revoking the agency and refraining from collective bargaining.*

The Board expressly admits that where the majority has designated a bargaining agent by means of cards or a petition, or the like, then "the employees may repudiate their representative at will at any time prior to the consummation of a collective bargaining agreement" (p. 23, fn. 12, of Board's brief). But the Board goes on to claim that, if the designation of an agent is by means of a Board-conducted election, all this is changed and the employees are shackled for a "reasonable period, usually one year." In other words, if the employees call upon the Board to conduct an election, they are unable thereafter for an entire year to be rid of an unwanted agent, even though no contract with the employer has been signed. On the other hand, if the employees designate a bargaining representa-

²H. Rep. No. 245, 80th Cong., 1st Sess., p. 27, anent the amendment to § 7 of the Act guaranteeing to employees "the right to refrain from any or all of such activities." Even the House Minority Report was forced to admit that the right to refrain is a "fundamental" and "natural right that exists and existed prior to passage and independent of the National Labor Relations Act." (H. Minority Rep., *Ibid.*, p. 75.)

tive by cards or by a petition, they can revoke the agency at will. We are unable to perceive any justification for such a distinction. Assuredly, the removal of an agent who has, let us say, proved faithless, should not depend upon whether he was originally designated by a petition or by means of a Board election.³

In recent practice, the Board has even gone to the extreme of insisting that, where there has been a Board election, a "union's representative status is *conclusively* presumed for at least 1 year following certification." [Italics in original.] (*Jersey City Welding & Machine Works, Inc.*, 92 NLRB 510, 511.) And the Board has even ordered an employer to bargain where every employee in a bargaining unit of approximately 30 persons had repudiated the union in writing, without any unfair labor practice, three weeks before the expiration of the magic year. Fortunately, however, the Court of Appeals, 3rd Circuit, set this order aside. (*National Labor Rel. Bd. v. Globe Automatic Sprinkler Co.*, 199 F. 2d 64.) The cited case is one of those listed in the Board's brief (p. 26, fn. 13) as in accord with its "one-year rule." We read the case quite differently. Moreover, we do not read any of the judicial decisions from other Circuits, cited by the Board, as going to the extremes asserted in the Board's brief.⁴

³Recently the Board reported to Congress that the Act "does not require that the representative be selected by any particular procedure, as long as the representative is clearly the choice of a majority of the employees." *Eighteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1953*, p. 10. If that be so, it is difficult to understand the Board's position that the selection of an agent by an election results in loss of power for a year to remove the agent, but a selection by other permissible means does not result in the loss of liberty to remove a representative who has fallen into disfavor.

⁴Repeatedly in its brief the Board seeks to convey the impression that practically every court has held in favor of its contentions in the

The history of the "one-year rule" is most instructive. In the early days the Board gave full recognition to the wishes of the employees under facts identical with those at bar. Thus, in *New York and Cuba Mail Steamship Company*, 2 NLRB 603, after an election won by union A, and prior to its certification, a majority of the employees signed cards for union B. There was no unfair labor practice. The Board ordered another election, saying (at p. 605): "In a case like this, where prior to the Board's certification of the results of an election there is an apparent change in the wishes of a majority of the men, we believe that another election should be held."⁵

case at bar. This is just not so. We call attention to the analysis of these judicial decisions in the opinion of McAllister, C. J., in *Mid-Continent Petroleum Corp. v. National Lab. Rel. Bd.*, 204 F. 2d 613, cert. denied 346 U. S. 856.

"The Court should not be misled by the argument on pages 10 and 29-30 of the Board's brief that the employer here is contending for a rule that would be disruptive of the proper administration of collective bargaining contracts. In the first place, the employees here revoked the agency before any contract was signed. Secondly, we do not urge that an agency can be revoked after the agency has been executed by consummation of an agreement with the employer. And thirdly, we call attention to the principle early established by the Board, and certainly a fairer one than low advocated by the Board, namely that, "The whole process of collective bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives, while at the same time continuing the existing agreements under which the representatives must function." [Italics supplied.] (*New England Transportation Company*, 1 NLRB 130, 138-139. See also *First Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1936*, pp. 108-109. To same effect see *Second Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1937*, pp. 118-119.) Even more specifically, the Board has pointed out in a well-considered case that no practical difficulties, such as today are conjured up, are really present. In that case the Board held: "Consequently, in this case, whichever organization is chosen as representative of the employees for the purposes of collective bargaining will be free to continue the existing agreement, to bargain concerning changes in the existing agreement, or to follow the procedure provided therein for its termination." (*Swayne & Hoyt, Ltd.*, 2 NLRB 282, 287.)

But, as time went on, the Board began to get cases where an employer sought to escape bargaining by claiming that, because of shrinkage of the work force or for some other reason, he "doubted" that the certified union still represented a majority. The Board met such resistance by holding that a certification cannot be challenged "upon the whim of the employer" for a "reasonable period after its issuance."⁶ However, this approach was later carried to extremes and finally culminated in a Board decision that a decertification petition filed within one year of a court decree enforcing a bargaining order would be dismissed, notwithstanding the lapse of almost 5 years since the union's certification.⁷ The Board in that case even went so far as to institute contempt proceedings against the employer, but the Court of Appeals, 5th Circuit, held as follows:

"In view of the facts shown in respondent's answer and not denied by the Board, that the certification was made in 1946, nearly six years ago, and that the present employees do not want the union to represent them, and of the Board's persistence in refusing to take any steps by either decertification proceedings or otherwise to give the present employees an opportunity to select their own representative, we are in no doubt that no probable cause has been shown for the belief that respondent has contumaciously refused to bargain in good faith or that a further inquiry into the charge of contempt would be justified."⁸

⁶*Fifth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1940*, p. 61, citing *Woodside Cotton Mills Company*, 21 NLRB 42.

⁷*Sixteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1951*, p. 83. This was the case of *Aldora Mills*, 10-RD-78.

⁸*National Labor Relations Board v. Aldora Mills*, 197 F. 2d 265, 267.

Within the next year or two the Board began to impose a rigid restriction of one year. That was the method employed by the Board to check frequent requests from rival unions to hold elections to oust incumbent unions. In turning down such requests, the Board expressly stated that its policy was based upon "administrative reasons."⁹

On the other hand, where an election was lost by a union, the Board did not hesitate to order further elections within the year at the instance of the losing but still hopeful union.¹⁰ Inasmuch as a petitioning union needed merely to show to the Board's regional director that it possessed cards from 30% of the employees, it was not difficult, even for a union which had lost an election, to obtain another one shortly thereafter. This 30% showing was developed by the Board as an administrative practice.¹¹ On occasion this practice was "relaxed" even down to an 18% showing.¹²

⁹"Ordinarily, the Board refuses for administrative reasons to entertain a petition for investigation and certification of representatives within 1 year after the issuance of a Certification." *Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942*, p. 56.

¹⁰The Board said that it would order such elections within the year so as not "to perpetuate a condition in which the opportunity for collective bargaining is restricted." *Eighth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1943*, p. 47, citing *General Aircraft Corporation*, 49 NLRB 916; *Packard Motor Car Company*, 47 NLRB 932; *Briggs Indiana Corporation*, 49 NLRB 920; and *Ford Motor Company*, 47 NLRB 939; 946.

¹¹*Tenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1945*, p. 16, fn. 7, citing numerous Board decisions. See also *Eleventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1946*, p. 10, fn. 5; *Fifteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1950*, p. 31; *Seventeenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1952*, p. 29.

¹²*Ibid.* The 30% practice was subsequently embodied in the Board's Rules and Regulations, Sec. 101.17, Code of Federal Regu-

The abuse of repeated and frequent elections at the instance of losing unions was corrected by Congress in 1947 by the addition of § 9(c)(3) restricting elections to one a year.¹³ The Board admitted that this amendment created a change in its prior practice.¹⁴

A few words should be said with reference to the Board's comparison of its elections for choice of a bargaining agent to popular elections for members of Congress or to elections of officers in private clubs (Board's brief, pp. 11, 24-25, 31-32, 39).

In the first place, it should be noted that the quotations (Board's brief, pp. 24-25) from the Senate and House Reports on the original Wagner bill, as to "an election in a democratic society", are torn from their context and thereby convey an impression wholly different from the intent of the authors of those Reports. The Board would have us believe that these passages support the teaching that an agent chosen at a Board election must be permitted, irrespective of the wishes of the employees, to function "for a reasonable time" or, in plain language, for one year.

But these excerpts from the Senate and House Reports in May and June, 1935, have nothing to do with the Board's

lations, Title 29—Labor, Chapter II—National Labor Relations Board, Part 101—Statements of Procedure.

¹³ Senator Ball, in debating the Taft-Hartley bill on June 23, 1947, pointed out that there were instances where the Board had held elections as many as three or four times in a single year. (93 Cong. Rec. 7683.) The Senate Report was equally explicit as to the purpose of Congress in limiting the number of elections. (S. Rep. No. 105, 80th Cong., 1st Sess., p. 25.)

¹⁴ " . . . it [§ 9(c)(3)] creates a prohibition against holding a second election within the same year after a valid election lost by a union, where the election does not result in a certification." *Thirteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1948*, p. 31. See also *Fourteenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1949*, p. 25.

thesis. Thus, the Senate Report, to the effect that an election would be of little worth if thereafter its result were for all practical purposes ignored, referred to imposing by statute an affirmative duty to bargain. The Board's brief omits the important sentence in the quotation from the Senate Report, namely that: "Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment." (S. Rep. No. 573, 74th Cong., 1st Sess., p. 12.) The writers of that Report were dealing entirely with the reason for including in the bill a "fifth unfair labor practice", to wit, a refusal by an employer to bargain collectively. A reading of the Report shows no intent to indicate that the mere holding of a Board election should operate to prevent "for a reasonable time", or for any time, the employees from ridding themselves of an agent who was no longer *persona grata*.

Nor does the Board's quotation from the House Report on the original Wagner bill (Board's brief, pp. 24-25) support the Board's position. When this excerpt is read in context it is seen to refer to the holding of an election so as to avoid a possible strike. The Report deals with a situation where a union has requested recognition but the employer has refused to bargain. Under such circumstances, says the Report, "the Board should not be required to wait until there is a strike or immediate threat of strike." Hence, the Report goes on to say, this is the type of "potentially of strife which the bill is designed to eliminate by the establishment of this machinery for prompt, governmentally supervised elections." (H. Rep. No. 1147, 74th Cong., 1st Sess., pp. 22-23.) The authors of the Report were not advocating an iron-clad rule prohibiting employees from revoking an agency whenever such agency happened to have been created by a Board election.

And perhaps this is the place to emphasize that the revocation of the agent's authority in the case at bar would not prevent the majority of the employees, at any time thereafter, from designating the same or another agent by cards or other suitable means, whereupon the employer would be required to recognize such agent. To be sure, by statute there could not be another election for a year, but this fact would not prevent the employees from requiring collective bargaining if they so desired; and the employer would refuse at his peril if a union, with cards from a majority, demanded bargaining negotiations.¹⁵

As to the Board's view that the choice of a bargaining agent at a Board election is analogous to the election of a member of Congress or to the election of the president of a social club, there would seem to be no need for extended discussion. A bargaining representative is a private agent for a special private purpose; a member of Congress, on the other hand, represents all the people, including the smallest infants, for the sovereign purpose of government, *i.e.*, for purposes of penal legislation, foreign relations, taxation, national defense, judicial remedies, and the preservation of constitutional rights. His term of office is fixed by statute and constitution. But no statute fixes the term of a bargaining agent—the “one-year” term is a gloss invented by the Board.

The analogy of the election of an officer of a private club is even more fanciful. Assuming that the by-laws of such a club fixed the term of office, nothing would prevent their amendment by the membership, and nothing would prevent an individual from resigning from the club if he did not like the officers. But does the Board mean to say

¹⁵Seventeenth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1952, pp. 159-160, and cases cited. See also *supra*, this brief, p. 5, fn. 3.

that the only remedy of the majority or perhaps all of the employees in a factory is to quit their jobs if they no longer wish to continue the bargaining agent who was chosen in a Board election? They can oust the agent, the Board admits, if he was originally designated by cards (see above, pp. 4-5). But, claims the Board, they cannot for a year remove even a faithless agent if he was chosen at a Board election. What greater absurdity could there be?

In conclusion we take issue with the Board's contention that Congress by the 1947 amendments accepted the Board's "one-year rule." As previously shown herein (*supra*, p. 9), the legislative object in restricting elections to not more than one a year was to cure the abuse of repeated elections at short intervals on the petition of a union which had failed to get a majority vote. The Board's assertion (p. 42 of its brief) that Congress approved its "one year" rule "after the most careful deliberation" is sheer phantasy. The fact that the conferees in 1947 dropped the provision in the House bill permitting a decertification election within a year indicated nothing beyond an intention not to have elections of any kind in excess of one a year. As to the dropping of the said provision, the House conference report simply stated that the "conference agreement adopts the provisions of the Senate amendment," *i.e.*, § 9(c)(3) as passed by the Senate prohibiting all elections in excess of one a year. (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 49.) These simple facts are far from constituting legislative acceptance and codification of the illiberal doctrine that for a year employees cannot by any means whatsoever end the power of an unwanted agent.¹⁶

¹⁶Likewise the excerpt from Senator Taft's speech on the floor, quoted on p. 42 of the Board's brief, exemplifies his intent to abolish excessively frequent elections. Mr. Taft would have been the last man in the world to force the majority of the employees to bargain through a representative whom they had repudiated. That would be the antithesis of the spirit and letter of the Act which bears his name.

The Board itself is apparently unsure of its argument based upon legislative history, because it urges (pp. 44-45 of its brief) that, even if Congress did not have the purpose of codifying the Board's "rule" as to non-revocability of an agency after a Board election, "it is a fair inference from all the circumstances" that Congress accepted such administrative construction. To that proposition the Board cites three cases.¹⁷ These cases, however, proceed on the theory of a uniform administrative construction and practice.

In the case at bar we have seen that the Board's "one-year rule" does not in fact involve the construction of any statutory language, and as an administrative practice it has been indeed far from consistent and uniform. (See main *amicus* brief, pp. 8-11.) Moreover, such "rule" is contrary to the 1947 amendment of § 7, guaranteeing the right to refrain from collective bargaining. Finally, the courts have by no means uniformly sustained the Board's position and have been often highly critical thereof. (See, e.g., *National Labor Rel. Bd. v. Globe Automatic Sprinkler Co.*, 199 F. 2d 64; *Mid-Continent Petroleum Corp. v. National Lab. Rel. Bd.*, 204 F. 2d 613, certiorari denied 346 U. S. 856.)

Before Congress can be deemed to have accepted an administrative practice, it must be one which is clear, uniform, and consistent, and in consonance with and not contrary to the statute. Although circumstances may sometimes justify weight to be attached to an administrative practice, "the qualification of that principle is as well established as the principle itself", namely that the practice must be consistent and uniform. (*Burnet v. Chicago Portrait Co.*, 285

¹⁷*Labor Board v. Gullett Gin Co.*, 340 U. S. 361, 365; *National Labor Relations Board v. Wiltse*, 188 F. 2d 917, 923, cert. den. 342 U. S. 859; and *National Labor Relations Bd. v. John S. Barnes Corp.*, 178 F. 2d 156, 161.

U. S. 1, 16. See also, *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 280, and *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 589.) The varying practice and the inconsistencies of the Board are, in part, described in the opinion in *National Labor Rel. Bd. v. Globe Automatic Sprinkler Co.*, 199 F. 2d 64, 68-9.

Finally we submit that what the Board here advocates is really an abuse of its original doctrine. What began as "a reasonable period" under all the facts and circumstances became in time a conclusive presumption of one year, which was applied to prevent revocation where there had been a Board-conducted election, but which was not applied where the agent had been designated by other means. This presumption the Board now asks this Court to sanction, and to do so in the face of the statutory right, existent at all times, of employees to refrain from collective bargaining. Such a rule, reminiscent of the laws of the Medes and Persians, would choke the liberty of workingmen. And to no purpose except the profit of the bargaining agent. Let us assume that the bargaining agent is an individual, as he may well be. (*Ford Motor Co. v. Huffman*, 345 U. S. 330, 338.) Suppose that this individual is jailed for a felony, suppose he embezzles and becomes a fugitive, suppose for any reason that he becomes unwanted as a bargaining agent—must the employees sit by for a year, must they "accommodate" themselves to their chains?

This Court has jealously guarded human liberties. It is always the last resort of those who struggle to preserve those liberties.

Respectfully submitted,

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